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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of: )  
)  
THE TENNIS CHANNEL, INC. )  
) MB Docket  
) No. 10-204  
v. )  
)  
COMCAST CABLE COMMUNICATIONS, ) File No.  
LLC ) CSR-8285-P  
)  
Complaint Alleging Program )  
Carriage Discrimination )

Monday,  
April 25, 2011  
Volume 2  
Hearing Room TW-A363  
445 12th Street, S.W.

Washington, D.C.

The above-entitled matter came on for  
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JUDGE RICHARD L. SIPPEL  
Chief Administrative Law Judge

Neal R. Gross & Co., Inc.  
202-234-4433

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1 P-R-O-C-E-E-D-I-N-G-S

2 9:35 A.M.

3 JUDGE SIPPEL: We have a few  
4 preliminaries. We're on the record. All the  
5 document boxes, I understand were allowed in  
6 and everybody is accounted for in that  
7 respect. Correct? Logistically, we're all  
8 set?

9 MR. CARROLL: Absolutely. We  
10 survived that, Your Honor. All is well.

11 JUDGE SIPPEL: I am sorry I wasn't  
12 here to see it. I think I helped you out. I  
13 gave you a little bit of support.

14 MR. CARROLL: You did.

15 JUDGE SIPPEL: Now we've got a  
16 couple of things this morning. First of all,  
17 I have not written an order about that bench  
18 brief. When Mr. Rigdon is going to take the  
19 stand, at least a day before, I'd like those  
20 bench briefs.

21 MR. PHILLIPS: Yes, Your Honor.

22 JUDGE SIPPEL: Right? And you

1 know basically what I want.

2 MR. PHILLIPS: Yes, Your Honor.

3 JUDGE SIPPEL: Okay. I'm not  
4 going to say anything more about that.

5 Now the other thing I have here, I  
6 have a request for -- request from Warren  
7 Communications. Is there anybody here on  
8 behalf of Warren Communications? Sir?

9 MR. MAKE: Yes, Your Honor.

10 JUDGE SIPPEL: And your name?

11 MR. MAKE: Jonathan Make.

12 JUDGE SIPPEL: Why does that name  
13 seem familiar? I don't know. Don't pay  
14 attention to me.

15 (Laughter.)

16 Do counsel know about this?

17 MR. PHILLIPS: We saw the letter,  
18 Your Honor.

19 JUDGE SIPPEL: You saw the letter.  
20 All right. What's the position of counsel?

21 MR. PHILLIPS: Mr. Carroll and I  
22 discussed it beforehand. We thought we would

1       probably proceed like we did the last time  
2       around.

3                   JUDGE SIPPEL:   How did we do that?

4                   MR. PHILLIPS:   In the NFL case,  
5       which is that at the time that -- we would  
6       endeavor to have as much out here in the  
7       public as possible, that when material that  
8       has been designated by the parties as  
9       confidential about to come up, we'd alert the  
10      Court to pause, and then we'd close the  
11      courtroom for that portion.  We would try to  
12      do it efficiently.

13                  JUDGE SIPPEL:   All right.

14                  MR. PHILLIPS:   Now that being  
15      said, Mr. Carroll and I both talked about it  
16      and we think that our openings which are sort  
17      of summaries of our arguments as Your Honor  
18      knows, will be difficult to do in an open  
19      courtroom.

20                  I'd like to do it in an open  
21      courtroom, but I tell you, I know I go into  
22      stuff that's been marked confidential and I

1 have no doubt --

2 JUDGE SIPPEL: You have to  
3 actually articulate the confidential  
4 information?

5 MR. PHILLIPS: Well, I will be  
6 referring to evidence and documents, Your  
7 Honor. The problem is it comes awfully close.  
8 We will be providing a redacted transcript  
9 after the fact to the press, so that everybody  
10 can see what was said with the things that are  
11 particularly confidential redacted.

12 JUDGE SIPPEL: What's your  
13 position on it? How do you see this?

14 MR. CARROLL: Your Honor, good  
15 morning.

16 JUDGE SIPPEL: Good morning, sir.

17 MR. CARROLL: The opening is, I  
18 think, as both Mr. Phillips and I anticipated,  
19 a helpful overview to Your Honor of the  
20 evidence that we're going to be offering. And  
21 some of the significant evidence is highly  
22 confidential. So it's very hard for us to



1 give you that opening overview without getting  
2 into some of that. And since it's really just  
3 arguments of counsel as opposed to the  
4 evidence itself which then starts with the  
5 witnesses, all the press will be missing is  
6 the wonderful thrill of watching Mr. Phillips  
7 and I hold forth in rhetorical fashion which  
8 I'm sure the press can -- it will probably  
9 break their heart, but they can probably get  
10 over that.

11 JUDGE SIPPEL: You've got a full  
12 room here this morning. They must be looking  
13 forward to something.

14 MR. CARROLL: You know, it's the  
15 only time I'm popular at all and I'm giving it  
16 up. But to move past that, when the witnesses  
17 --

18 JUDGE SIPPEL: You're always  
19 popular around here, usually.

20 MR. CARROLL: When the witnesses  
21 start, right away with that, last time Mr.  
22 Phillips is right, we had the press -- the

1 presumption was that it would be open for the  
2 witnesses.

3 JUDGE SIPPEL: Right.

4 MR. CARROLL: And that we would  
5 even try to compartmentalize where we had to  
6 get into confidential information, so we  
7 weren't going in and out, in and out, in and  
8 out. And that's more manageable with the  
9 witnesses, I think. With the opening, I would  
10 agree with Mr. Phillips. I think it makes  
11 sense to proceed, to close just for the  
12 opening arguments and open it back up for the  
13 witnesses and hopefully there will not be too  
14 much disruption of the testimony itself. That  
15 would be my suggestion.

16 JUDGE SIPPEL: No, these are good  
17 suggestions, but why -- in an opening, why do  
18 we need that information? In a general way,  
19 you say well, the evidence will show there's  
20 an indication this way or an indication -- or  
21 it's going to statistically show or whatever,  
22 but it shows what it's going to show without

1       reciting the numbers. I'm not going to keep  
2       them in my head, I'll tell you right now.

3               MR. PHILLIPS: I understand that,  
4       Your Honor. The evidence will -- we will  
5       definitely -- a big portion of this case has  
6       to do with highly confidential information  
7       having to do with terms, for example, and  
8       transactions that have been involved. And I'm  
9       just concerned. I think the numbers are  
10      important, but even just characterizing the  
11      numbers, I'm not so sure that that doesn't,  
12      that that wouldn't garner an objection from  
13      one side or the other.

14             JUDGE SIPPEL: Okay. I've heard  
15      enough. We'll do it your way.

16             Now remember, last time we got a  
17      letter from Mr. Bloomberg, Bloomberg  
18      Broadcasting about not being -- there is --  
19      and I've had legal research on this, there is  
20      a provisional law that says that I'm supposed  
21      to keep it as open as I possibly can, while  
22      closing it. It's another one of those really

1 cool straight standards.

2 (Laughter.)

3 So to avoid -- I want you to think  
4 in those terms also. And I really don't want  
5 to get into in and out, in and out, in and  
6 out. Can you try and group it so that okay,  
7 this section of the arguments, we're going to  
8 ask people to leave and when they come back  
9 then you'll be able to not ask them to leave  
10 again. Can it just be a one timer?

11 MR. PHILLIPS: We will endeavor to  
12 do that, Your Honor, certainly.

13 JUDGE SIPPEL: I'm sure you're  
14 going to do it when you say endeavor. That's  
15 a good word, but I think you're going to do  
16 it.

17 MR. PHILLIPS: We will do it.

18 JUDGE SIPPEL: The in and out  
19 really gets very disconcerting.

20 MR. PHILLIPS: Well, sitting in a  
21 room with this many people in it, I agree with  
22 you.

1 JUDGE SIPPEL: You gentlemen are  
2 very popular this morning.

3 So how to proceed. Again, I want  
4 to come back and make sure everybody  
5 understands this, what you're asking for, Mr.  
6 Make, is that right?

7 MR. MAKE: Yes.

8 JUDGE SIPPEL: Are you asking to  
9 tape record this or somehow or other put it on  
10 the record?

11 MR. MAKE: Our concern is more  
12 that  
13 -- as much -- I think counsel to both parties  
14 said, as much as possible be open to the  
15 public.

16 JUDGE SIPPEL: Right.

17 MR. MAKE: The parts that are not  
18 open to the public, we receive timely  
19 transcripts for. In previous cases that did  
20 not occur. There often was a delay of over  
21 two business days in receiving that. So there  
22 is a disadvantage to the public and to our

1 subscribers and readers when that occurs. So  
2 it's twofold. One is both the parties have  
3 addressed and you've addressed that as much of  
4 the case as possible be open. And secondly  
5 for the parts of the case that are not open,  
6 redacted transcripts be made available in a  
7 more timely fashion than they had been in  
8 previous cases that have been before you,  
9 including program access cases.

10 JUDGE SIPPEL: Now so you don't  
11 want to wait two days. You just want it  
12 overnight, is that basically it?

13 MR. MAKE: We would like it as  
14 soon as feasibly possible. Waiting two days  
15 does not make that information very timely.  
16 We receive it by the time the public receives  
17 it or by the time our readers read it.

18 JUDGE SIPPEL: That expression  
19 "hold the presses" doesn't count any more.  
20 Can you gentlemen accommodate that?

21 MR. PHILLIPS: We will certainly -  
22 - yes, Your Honor, we will. I'll never use

1 the endeavor word again, Your Honor.

2 JUDGE SIPPEL: You know, Ms. Gosse  
3 knows more about this than I do, but to get --  
4 as soon as possible to get a copy, one copy  
5 redacted out on the press table or down to the  
6 press office and whatever Mr. Make wants to do  
7 to make accommodations for himself is up to  
8 Mr. Make, but if it's out there for the press  
9 in a timely fashion I think we've met our  
10 burden. I say "we", I'm responsible for this  
11 as well as you are.

12 MR. PHILLIPS: Mr. Carroll and I  
13 haven't discussed this particularly, but the  
14 last time we both had people who were going  
15 through the transcript as soon as we received  
16 it and conferring to make sure we agreed on  
17 the designations and putting it out there, I  
18 anticipate that that same procedure will work  
19 here.

20 MR. CARROLL: I think so. Of  
21 course, we could make it even faster if Mr.  
22 Make would just like us to write the news



1 reports for him.

2 (Laughter.)

3 Your Honor, we'll designate  
4 somebody from each team to be the expediting  
5 redactors to do this as quickly as we can.

6 JUDGE SIPPEL: It's all in the  
7 public interest, right?

8 MR. CARROLL: Yes.

9 JUDGE SIPPEL: Okay. All right.  
10 Mr. Make, thus far are you satisfied?

11 MR. MAKE: We appreciate the  
12 accommodations, Judge, and I appreciate you  
13 taking our request under consideration. Thank  
14 you, yes.

15 JUDGE SIPPEL: Did I read  
16 something in here about you wanting to tape  
17 record or to broadcast the proceedings?

18 MR. MAKE: Not in our request, no.

19 JUDGE SIPPEL: Mary, is there  
20 another request for that?

21 MS. GOSSE: I didn't see one.

22 JUDGE SIPPEL: Okay. I've been



1       dreaming. Good. Good. Good. Good. Good.  
2       All right, the only thing -- what else do we  
3       have left? We have left there are still some  
4       outstanding questions on protective orders for  
5       one of the non-party witnesses which I have  
6       not acted on, but I will. I will.

7               Is there any other business that  
8       we have? We have the stipulation regarding  
9       admissions of evidence. That's a good one.  
10       We talked about that, I remember, last week.  
11       But why don't I just state for the record that  
12       the stipulation regarding admission of  
13       evidence which was executed by all counsel  
14       including Bureau on the 18th of April 2011 is  
15       accepted and will be the controlling rules as  
16       far as they go on evidence.

17               MR. CARROLL: Thank you.

18               JUDGE SIPPEL: Thank you. That's  
19       a good one. And what else do I have here that  
20       I can talk about? The second protective order  
21       for Nielsen. Does anybody have -- it was  
22       proposed -- it's a proposed order. Does

1       anybody have any comment or objection or  
2       anything about my signing those orders?

3               MR. CARROLL: I think that's been  
4       agreed by both sides.

5               JUDGE SIPPEL: I assume so.

6               MR. OSHINSKY: The Bureau as well.

7               JUDGE SIPPEL: All right. I see  
8       it's already signed by Mr. Carroll and signed  
9       by Mr. Rigdon. How many other signatures do  
10      I have? Mr. Knowles-Kellett. Mr. Sherman.  
11      Everybody but me. Okay. That's the  
12      stipulation and third protective order  
13      concerning the use of covered information.

14              And the only thing I don't have if  
15      somebody would do me a favor and give me a  
16      second protective order without the word  
17      "proposed" in it, we can do that, but it would  
18      be faster if you all do it. And if you have  
19      it up here after lunch, I'll just sign it.

20              MR. CARROLL: Thank you, Your  
21      Honor.

22              JUDGE SIPPEL: You're welcome.

1 Thank you. So now, you're going to proceed,  
2 Mr. Phillips, you being the Plaintiff?

3 MR. PHILLIPS: Yes, Your Honor. I  
4 will.

5 JUDGE SIPPEL: And how do you want  
6 to proceed right now, with the opening  
7 segment.

8 MR. PHILLIPS: I would like to  
9 have an opening statement, Your Honor. It's  
10 pretty brief, but you mentioned earlier, I do  
11 think I'm going to cover some confidential  
12 information.

13 JUDGE SIPPEL: At what point do  
14 you want to -- give me some indication. I'll  
15 give the press some indication.

16 MR. PHILLIPS: Well --

17 JUDGE SIPPEL: How long are they  
18 going to be able to sit here, I guess that's  
19 what I'm really asking.

20 MR. PHILLIPS: I had anticipated  
21 that I would just do the opening in private.  
22 I hadn't really looked through it with an

1       idea.

2                   JUDGE SIPPEL: That's not going to  
3       work. That's how we had that issue we had to  
4       deal with last time. I thought it was a great  
5       idea and it wasn't a great idea because -- the  
6       interpretation of the Constitution says it's  
7       not a good idea, so we don't do that. The  
8       standard is something to the effect that you  
9       do the best you can to say as much -- disclose  
10      as much as you can and you have to have a --  
11      in other words, you have to show an effort,  
12      not just say well, we're going to close this  
13      down because it's too complicated.

14                   I appreciate everything you're  
15      saying. I'm sorry, I don't want to sound flip  
16      on this. It's very important.

17                   MR. CARROLL: Your Honor, can I  
18      just ask -- I had thought that there was no  
19      objection from the Warren Communications  
20      gentleman, Mr. Make, to the proposal which was  
21      that the opening arguments would be closed and  
22      then we would open it up for the first

1 witness.

2 JUDGE SIPPEL: Mr. Make, don't  
3 pick up on what I say. I was trying to  
4 anticipate -- I'm just trying to anticipate  
5 problems.

6 MR. MAKE: Your Honor, we would  
7 prefer as much as possible be made open to the  
8 public while protecting any confidential  
9 and/or proprietary information and to the  
10 extent that can be accommodated, we are  
11 appreciative.

12 JUDGE SIPPEL: Okay, let's give it  
13 a try.

14 MR. PHILLIPS: Your Honor, I'm  
15 looking through my opening and of course, I  
16 don't tend to follow these outlines very well,  
17 but I can make it the first two pages.

18 JUDGE SIPPEL: All right.

19 MR. PHILLIPS: And then I'm going  
20 to get into the meat of the evidence.

21 JUDGE SIPPEL: Fine.

22 MR. PHILLIPS: In terms of

1       introductory things --

2               JUDGE SIPPEL: In that case, we're  
3       doing the best we can. I'm going to leave the  
4       door open as long as we can, too. It's kind  
5       of warm in here. Have they done the best they  
6       can with the air conditioning or whatever they  
7       use?

8               MS. GOSSE: Do you want me to go  
9       take care of that?

10              JUDGE SIPPEL: Please. Is  
11       everybody comfortable? All right, let's get  
12       started.

13              OPENING ARGUMENT OF  
14              C. WILLIAM PHILLIPS, ESQ.  
15              ON BEHALF OF THE TENNIS CHANNEL

16              MR. PHILLIPS: As Your Honor  
17       knows, my name is Will Phillips of Covington  
18       and Burling and I represent The Tennis  
19       Channel.

20              I'd like to start off today, Your  
21       Honor, by quoting -- talking about Section  
22       616, the statute that is at issue here.

1 Section 616 prohibits a cable distributor from  
2 engaging in conduct the effect of which is to  
3 unreasonably restrain the ability of an  
4 unaffiliated video programming vendor to  
5 compete fairly by discriminating in video  
6 programming distribution on the basis of  
7 affiliation or non-affiliation of vendors.  
8 Discrimination on the basis of affiliation or  
9 non-affiliation, Your Honor, those are the  
10 words, I'd like to focus on.

11 Now how can you tell if there's  
12 discrimination? That's going to be the  
13 question of this proceeding.

14 Let me start with a gender  
15 example, Your Honor. Let's say that a woman  
16 applies for a job, but is turned down. Is  
17 that discrimination? No. Not merely because  
18 the employer didn't hire her. A man applies  
19 for the same job and gets the job. Is that  
20 discrimination? Again, no, without knowing  
21 more you can't call that discrimination.

22 What if I told you that the two

1 applicants have essentially the same  
2 qualifications, Your Honor? Let's pose the  
3 question. What if I told you that the woman  
4 was subjected to an extensive application  
5 procedure in which she had to be approved by  
6 four regional managers from different parts of  
7 the company and another list of criteria.  
8 Discrimination? Well, before you answer that  
9 question, Your Honor, what if I told you that  
10 the man did not have to do any of that? He  
11 was not subjected to any of those tests and he  
12 got the job.

13 Discrimination? Certainly, Your  
14 Honor, that's what the law is. My point here  
15 is that discrimination cannot be determined by  
16 examining the decision to hire or not to hire  
17 the female candidate. The discriminatory  
18 character of this example is exposed when you  
19 examine the decision to hire the woman or not  
20 to hire her and the decision on the other  
21 side, the decision to hire the man where he  
22 was not subjected to the same tests or



1 procedures. That is what makes this  
2 discrimination.

3 And if I may, Your Honor, I want  
4 to put what I call the discriminatory equation  
5 up here on the board. We'll have --

6 JUDGE SIPPEL: Are you taking me  
7 into the land of numbers?

8 MR. PHILLIPS: No, not yet, Your  
9 Honor. We're just going to start and we're  
10 going to have what I call the discriminatory  
11 occasion. The man, the woman treated equally,  
12 they're not treated equally.

13 You can't make the decision on  
14 discrimination merely by looking at this side  
15 of the equation. You also have to look at how  
16 the decision is made here and compare them.  
17 Now is this discrimination against the woman?  
18 Well, discrimination involves two people,  
19 treating two people differently based upon  
20 impermissible grounds. There can be  
21 discrimination against the woman candidate for  
22 the job, or it can be discrimination in favor

1 JUDGE SIPPEL: Suppose in that  
2 situation with the employment decision,  
3 supposing the employer went to Princeton and  
4 M went to Princeton. And W went to someplace  
5 else, Harvard, wherever. So he hires the guy  
6 because he wants Princeton.

7 MR. PHILLIPS: If they're  
8 materially equivalent considerations, they're  
9 similarly situated, if a degree between  
10 Harvard and Princeton and I would submit that  
11 the degree between Harvard and Princeton  
12 doesn't matter --

13 JUDGE SIPPEL: I didn't go to  
14 Princeton, but I've talked to people who went  
15 there.

16 MR. PHILLIPS: I didn't either.  
17 And I think they're all very smart when they  
18 do, Your Honor, but if there's not a material  
19 distinction to the decision, then yes, Your  
20 Honor, there's discrimination.

21 In our case, Your Honor, Comcast's  
22 decision to restrict The Tennis Channel is on